Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: September 26, 1997
CASE NO: 96-INA-134

In the Matter of:

JOHNNY'S FAMOUS REEF RESTAURANT
Employer

On Behalf of:

ENRIQUE GARCIA
Alien

Appearance: Howard L. Baker, Esquire
New York, NY
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On February 9, 1994, Johnny's Famous Reef Restaurant ("employer") filed an application for labor certification to enable Enrique Garcia ("alien") to fill the position of Cook at a weekly wage of $ 303.00 (AF 13). The job duties are described as follows:

> Prepare and cook seafood dishes in menu such as fried or steamed whiting, porgy, etc. using frier or steamer. Cook soups. Clean, cut and bread fish, scallops, lobster. Open mussels & oysters, prepare shrimp cocktail and seafood salads (AF 13).

The job requirements are two years experience in the job offered.

On July 26, 1995, the CO issued the Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which requires the employer to document that the requirements are the minimum necessary for the performance of the job. The CO noted that the alien had no experience as a cook prior to his working for the employer, and that the employer apparently trained the alien for the position. The CO stated this finding may be rebutted by: (1) submitting evidence which clearly shows that the alien at the time of hire had the qualifications now required, (2) submitting evidence that the alien gained the required experience working for the employer in jobs which were not similar to the job for which labor certification is sought, (3) submitting evidence that it is not feasible due to business necessity to hire a worker with less than the qualifications presently required, or (4) eliminating the requirement. The CO also cited a violation of § 656.20 (g) (1) which requires an employer to document that job notice for the position was posted at the location of employment for at least ten consecutive days. Such notice must specify terms of employment and prevailing wage. The CO noted that although notice was posted, it merely referred applicants to the state employment agency which is violative of the regulations.

In rebuttal, dated August 29, 1995, the employer argued the alien was trained in April 1990 by a family friend. The employer stated that "due to their close relationship, this cook made extra efforts to train [the alien] on his off-work hours. The training of Mr. Garcia was done gratuitously by his friend and not by [the employer]. The cook that trained Mr. Garcia left our

[1] All further references to documents contained in the Appeal File will be noted as "AF."

restaurant voluntarily and Mr. Garcia replaced him" (AF 44) The employer thus argued that it was no longer feasible to train a new cook due to the small size of the business and the increased work volume.

The CO issued the Final Determination on October 10, 1995 denying the labor certification. The CO found that the employer violated § 656.21 (b) (5) by failing to document adequately the infeasibility of training a U.S. worker. On October 18, 1995, the employer requested administrative review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 62).

Discussion

The issue presented by this appeal is whether the employer specified the minimum job qualifications for the offered position pursuant to § 656.21 (b) (5). Section 656.21 (b) (5) provides that an employer is required to document that its requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has not hired workers with less training or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. This section addresses situations where the employer requires more stringent qualifications for a U.S. worker than it requires of the alien, and prevents the employer from treating an alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

It is well settled that an employer violates § 656.21 (b) (5) if it hired the alien with lower qualifications than it specified on the labor certification application, unless the employer demonstrates that it is infeasible to train U.S. workers. *See Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988); *MMMats, Inc*, 87-INA-540 (Nov. 24, 1987). Furthermore, the Board also has held that under § 656.21 (b) (5), an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.,* 89-INA-284 (May 14, 1991).

In rebuttal argument, the employer contends that it is infeasible to train U.S. workers for the offered position because the restaurant has experienced a substantial increase in business volume over the past few years while the restaurant staff has remained constant (AF 44). The employer pointed out that the alien was trained under special circumstances because one of the restaurant's former cooks, a friend of the alien's, made extra efforts to train him. The employer thus maintains that it does not have the time or the staff to train a new cook.

In the Final Determination, the CO noted that the employer has realized an increase in annual business of almost $500,000 per year over the five-year period from the time the alien was trained to the time the application was filed. The CO thus concluded that this substantial growth in income would allow for resources needed to train U.S. workers for the position. The CO

found the employer's rebuttal argument unconvincing, and determined that the employer failed to prove that it was infeasible to train a U.S. worker for the position. *See also 58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991); *Fingers, Faces, and Toes*, 90-INA-56 (Feb. 8, 1991) (the employer's burden of establishing why it is not now feasible to offer the same favorable treatment to U.S. applicants has been characterized as heavy). In *Super Seal Manufacturing Co.*, 88-INA-417 (Apr. 12, 1989) (*en banc*), the Board held that an increase in volume of business or general growth and expansion, by itself, is insufficient to establish infeasibility. *See also Green Kitchen Restaurant*, 91-INA-259 (July 17, 1992). The Board held that unless an employer proves otherwise, increased training capability is presumed to accompany growth. We believe the employer has failed to overcome this presumption, and therefore conclude certification properly was denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.